

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 126 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO
- @

ANANTRAI KANHAYALAL SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 126 of 2000
MR JM BUDDHBHATTI for Petitioner No. 1
MR DP JOSHI, PUBLIC PROSECUTOR for Respondent No. 1
MR NIRAV C THAKKAR for Respondent No. 2
MR ASHISH M DAGLI for Respondent No. 3
-

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /08/2001

C.A.V. JUDGEMENT

#. The complainant, Anantrai Kanhyalal Shah has filed
this revision challenging the judgment and order of the

Joint Civil Judge (S.D.) and JMFC, Bhavnagar, Shri RR Parekh whereby he has acquitted the accused from the charges under secs.381 and 114 of the Indian Penal Code.

#. Shri JM Buddhbhatti, learned counsel for the revisionist, Shri DP Joshi, learned APP representing the respondent no.1 and Shri Ashish M.Dagli representing the respondent nos.2 and 3 were heard.

#. It is now undisputed that no appeal against acquittal was filed by the State of Gujarat. This information was given on the last date by Shri HH Patel, learned APP, which was confirmed on 14th August at the time of hearing of this revision by Shri DP Joshi, learned APP.

#. Shri Dagli has tried to support the judgment of the Magistrate, but without success. Without any fear of contradiction, it can be said that Shri RR Parekh, Joint Civil Judge (S.D.) & JMFC, Bhavnagar has no knowledge of criminal law and procedure contained in the Code of Criminal Procedure. The judgment is full of illegalities and absurdities. The judgment is also perverse because it is not based on appreciation of evidence on record, rather finding has been recorded on mere surmises and conjectures. In the operative portion of the order, the Magistrate has mentioned that the accused are given benefit of doubt in the absence of evidence and are acquitted. This order shows that in the opinion of the Magistrate it was a case of total absence of evidence. This perversity is exhibited from the discussion in the judgment, where eye-witnesses were examined by the prosecution who supported the prosecution story regarding commission of theft, spot arrest and recovery of full gas cylinder filled with LP Gas. This, therefore, shows apparent perversity in the judgment, and as such, interference in revision is justified. Normally, the scope of interference in revision is limited and the revisional Court can not reappraise the evidence with a view to substitute its own finding. However, it is not a case of reappraisal of evidence which has to be done by the revisional Court in this case. On the other hand, it is specimen of perverse judgment and also absurd judgment totally devoid of elementary principles of criminal jurisprudence. Some of the instances of perversity and lack of knowledge of criminal law and procedure on the part of the Magistrate are highlighted below :

The Magistrate has no knowledge as to how a judgment in a criminal case is to be written. If, charges are framed in a criminal case then the Magistrate, after examining the prosecution

evidence as well as defence evidence, if any, has to record specific finding whether charges are established beyond all reasonable doubt or not. Instead of considering the charges framed in the case, the Magistrate has framed issues and has returned findings on the issues. Framing of issues is foreign to the criminal jurisprudence and I do not find any provision in the Code of Criminal Procedure which empowers a Magistrate or a Judge to frame issues and record finding on those issues. On the other hand, after framing of charges and recording prosecution evidence, statement of accused and further after examining the defence evidence and hearing the arguments, he has to give finding whether the charges are proved beyond reasonable doubt as well as beyond all shadow of doubt or not.

#. Thus, the procedure adopted by the Magistrate in framing issues and recording finding on issues is not only foreign to the scope of criminal law, but is, his own imagination which renders the judgment perverse.

#. The judgment is, further, perverse, because nothing has been said in it as to how the eye witnesses and the persons who arrested the accused while committing theft of the gas cylinder could be disbelieved. If, eye witnesses were examined then their statements as a whole should have been considered and cogent reasons should have been given why they are not reliable. That exercise has not been done, rather eye witnesses have been conveniently ignored by the Magistrate for the reasons best known to him.

#. It is shocking to note in the judgment that a peculiar proposition of law has been laid down by the Magistrate that, if there is doubt as small as the needle head then the accused should be acquitted in absence of the evidence. If it is a case of absence of evidence or it is a case of no evidence then certainly the accused have to be acquitted. But, if there is evidence then the accused can not be acquitted on the ground that there is doubt as small as the needle head. On the other hand, the basic principle of criminal law is that, if the prosecution succeeds in establishing beyond reasonable doubt the commission of offence by the accused, the latter has to be convicted. The concept, therefore, is, that it is reasonable doubt which if created in the prosecution story by the accused that entitles him to acquittal. Reasonable doubt can not be stretched to mean unreasonable doubt or doubt as small as the needle head

as propounded and observed by the Magistrate. It is with this absurd approach of criminal law and procedure that the evidence has been appreciated by the Magistrate which has rendered the judgment perverse.

#. The defence of the accused has been accepted without formal proof. If, cases are filed against the accused by the employer, it does not carry impression, nor inference can be drawn that criminal case was initiated simply to falsely implicate the accused. If spot arrest and recovery of stolen property is established then doubt can not successfully be created by the accused by filing certain papers of cases pending in the Labour Court and elsewhere.

#. The Magistrate has also criticized the Investigating Agency. It is also settled principle of law that the case is not to be decided on the folly committed during investigation. On the other hand, criminal cases are decided on the basis of evidence adduced by the prosecution. This principle has also been overlooked by the Magistrate and he has unnecessarily criticized the Investigating Agency.

##. The Magistrate has also discussed infirmities in written extra judicial confession made by the accused before Kusumben. The said written extra judicial confession is alleged to have been written by the accused and signed by him. However, this document was not proved, inasmuch as, Kusumben, in whose presence it was written and signed by the accused was neither interrogated by the Investigating Agency, nor examined by the prosecution. Shri Buddhbhatti, learned counsel for the revisionist, in these circumstances, rightly contended that this is a fit case where, after setting aside the judgment and order of the Magistrate, the case should be remanded for re-trial with liberty to the prosecution to examine Kusumben to prove the written extra judicial confession. Not only that the Investigating Agency was careless in not interrogating Kusumben but the prosecution also did not think it proper to request the Magistrate for permission to examine Kusumben, who was a material witness of the prosecution. If, the written extra judicial confession was not proved, it could not be read in evidence by the Magistrate, nor it could be criticized by him. Even if, the Investigating Agency did not interrogate Kusumben and the prosecution failed to examine her, the powers of the Magistrate under sec.311 of the Code of Criminal Procedure are unlimited, which provides that any Court may, at any stage of any inquiry, trial or other

proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

##. Thus, the Magistrate could have exercised this power under sec.311 of the Code of Criminal Procedure and could have summoned Kusumben for just decision of the case and could have examined her as a court witness and she could have proved or failed to prove the written extra judicial confession made by the accused. In that event, necessary inference could be drawn against the prosecution and not otherwise.

##. The judgment of the Magistrate is full of irrelevant considerations. He has lost sight of the fact that it was a case of spot arrest and recovery of stolen LP Gas Cylinder. In that event, he was not justified in drawing adverse inference that stock register, gate pass, etc. were not produced and proved by the prosecution.

##. For the reasons stated above, I feel that in the interest of justice and for reaching just decision in the case, the revision should be allowed and is hereby allowed. The order under revision is set aside. The case is remanded for afresh trial by some Magistrate other than Shri RR Parekh, if he happens to be posted at present at Bhavnagar. The Sessions Judge, Bhavnagar will transfer criminal case no.853/1996 to some other competent Magistrate, who shall decide the same in accordance with law after permitting the prosecution to examine the material witness, Kusumben. The evidence already on record shall be read in evidence and the witnesses who have already been examined need not be recalled either for examination-in-chief or for cross-examination or re-examination. Thereafter, the case shall be decided afresh in accordance with law taking into consideration the evidence already on record and additional evidence in the nature of statement of Kusumben, Ex.27 and also the observations made in the body of this judgment. The accused nos.2 and 3 shall appear before the Sessions Judge, Bhavnagar on 30-8-2001 for seeking direction as to in which Court they are required to appear for trial and on which date.

Dated : __/08/2001. (D.C. Srivastava, J.)

/sakka f

